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No. 06-856

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES LaRUE,

Petitioner,

v.

DeWOLFF, BOBERG & ASSOCIATES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE SELF INSURANCE INSTITUTE OF AMERICA, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Self Insurance Institute of America, Inc. ("SIIA") is a non-profit corporation of nearly 1000 members, serving tens of millions of health plan beneficiaries, dedicated to the advancement and protection of the self-insurance industry. SIIA's membership includes self-insured entities such as employer plan sponsors, as well as service providers such as third-party administrators, reinsurance companies, and other entities that support the self-insurance business. SIIA is the only association in the United States that exclusively represents firms, professionals, and organizations that participate in the broad spectrum of self-insurance, including self-insured group health plans.

Through SIIA, its members coordinate their views and provide practical information and recommendations to government and the public on a range of subjects relevant to the effective functioning of the self-insurance system, including the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, that concern self-insured health plans and plan participants. SIIA's mission includes rendering assistance to courts in their deliberations on significant self-insured health plan issues of broad concern to its members. Indeed, SIIA has filed briefs as amicus curiae in previous ERISA cases before the Court. *See, e.g.*, Brief Amicus Curiae of Self-Insurance Institute of America, *FMC Corp v. Holliday*, No. 89-1048 (filed Jan. 26, 1990); Brief Amicus Curiae of Self-Insurance Institute of America, *Great-West Life & Annuity Insurance Co. v. Knudson*, No. 99-1786 (filed May 10, 2001); Brief Amicus Curiae of Self-Insurance Institute of America, *Sereboff v. Mid Atlantic Medical Serv., Inc.*, No. 05-260 (filed Feb. 23, 2006).

SIIA has a strong interest in this case. The issues raised in this appeal concern the remedies available to both fiduciaries

[1] Amicus has sought and has obtained written consent from counsel to both parties to submit this amicus brief. Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, Amicus states that no counsel for a party has written this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

and participants in ERISA plans. SIIA believes that the availability of adequate equitable remedies is indispensable to the proper administration of ERISA plans, regardless of whether breaches by plan fiduciaries harm participants or plan providers. Indeed, if appropriate remedies are not available to both participants and plan providers, the integrity of plan assets will be compromised and, in turn, the well-being and security of the employee participants and their dependents will suffer. The decision of the Fourth Circuit undermines the security and stability that Congress intended to bring to employer-based retirement plans when it enacted ERISA. SIIA therefore submits this amicus brief in support of Petitioner to urge the Court to reverse the decision below.

INTRODUCTION

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Congress "wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (internal quotations omitted). ERISA is designed to prevent plans from becoming underfunded because of mismanagement, waste, or conversion of plan funds. This Court, honoring the fundamental aim of the statutory regime, thus has held plan participants to their equitable duty under ERISA to restore funds that rightfully belong to the plan. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006). This obligation to restore plan funds should apply with equal force to plan fiduciaries. *See Peckham v. Gem State Mut.*, 964 F.2d 1043, 1051 (10th Cir. 1992) ("A single miscue by a plan agent could result in a modification of the plan in a way that might leave it radically underfunded.").

Section 404 of ERISA imposes substantial legal and equitable duties on plan fiduciaries. 29 U.S.C. § 1104. Section 409 of ERISA provides a remedy for breach of these duties, holding the fiduciary personally liable "to make good to such plan any losses to the plan resulting from each such breach" and, inter alia, allowing for other "equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary." *Id.* § 1109(a). Section 502 of ERISA, in turn, provides the vehicle for judicial relief. Section 502(a)(2) authorizes participants, beneficiaries, and other plan fiduciaries to bring civil actions against plan fiduciaries that fail to meet their obligations under Section 409 of ERISA. *Id.* Section 502(a)(3) more broadly authorizes a "participant, beneficiary, or fiduciary" to obtain "appropriate equitable relief" to "enforce any provision of . . . the terms of the plan." *Id.* § 1132(a)(3).

Here, Petitioner alleged that Respondent failed to honor his investment wishes in violation of Section 404 of ERISA, resulting in a loss of nearly $150,000.00 to his individual plan account. Petitioner thus brought claims under Section 502(a)(2) and Section 502(a)(3) to require the plan fiduciary to restore the funds to the plan in accordance with Section 409 of ERISA. The Fourth Circuit rejected both claims. *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (2007). The ruling below was incorrect for several reasons and should be reversed.

First, Petitioner's claim falls comfortably within the ambit of Section 502(a)(2). Petitioner is a "participant" who brought a suit to require the plan fiduciary to "make good" on "losses to the . . . plan" that resulted from a breach of fiduciary duty. *See, e.g., Milofsky v. Am. Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006) (en banc). Put simply, Section 502(a)(2) entitles "individual-account-plan participants not only to what *is* in their accounts, but also to what *should* be in there given the terms of the plan and ERISA's fiduciary obligations." *Graden v. Conexant Sys., Inc.*, — F.3d —, No. 06-2337, 2007 WL 2177170, at *3 (3d Cir. July 31, 2007). The Fourth Circuit rejected this argument

because, in its view, Section 502(a)(2) "requires" a plaintiff's "individual remedial interest [to] serve as a legitimate proxy for the plan in its entirety." *LaRue*, 450 F.3d at 574. The Fourth Circuit's interpretation is mistaken.

This Court has made clear that a plan fiduciary may not be held "personally liable to a plan participant" in tort for extracontractual damages. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 136 (1985). *Russell* explained that "Congress did not intend" for Section 409 "to authorize relief except for the plan itself." *Id.* at 144. Despite the Fourth Circuit's conclusion to the contrary, Petitioner's claim seeks recovery that inures to the benefit of the plan. The recovery will not only restore funds to the individual plan account, but also will defray overhead and other administrative costs that are shared among all participants in this unitary trust. *See, e.g.*, *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 235 n.4 (3d Cir. 2005). Moreover, the Fourth Circuit's attempt to distinguish between individual suits, which were precluded in its view, and suits on behalf of a "subset" or "subclass" of participants, which were not, is illegitimate. Such distinctions find no support in the text of Section 502(a)(2) and would relieve plan fiduciaries of liability so long as their breaches are confined to small group of plan participants. This cannot be the law.

Second, consistent with this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), Petitioner stated a claim for "appropriate equitable relief" under Section 502(a)(3). Whether the remedy sought is "equitable" turns on whether the relief was "typically available in equity" at the time of the divided bench. *Id.* at 256. The relief sought here—a "surcharge" against the fiduciary—is unquestionably equitable relief under Section 502(a)(3). Surcharge is an equitable remedy that holds a "trustee who commits a breach of trust . . . chargeable with the amount required to restore the values of the trust estate and trust distributions to what the would have been if the trust had been properly administered." RESTATEMENT (THIRD) OF TRUSTS § 205 (1992). Thus, the surcharge remedy is not the imposition

of money damages; it is an "equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." *In re Scheidmantel*, 868 A.2d 464, 492-93 (Pa. Super. Ct. 2005); *see also* 11 U.S.C. § 543(c)(3) (including surcharge as equitable remedy under bankruptcy law).

The Fourth Circuit improperly read this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), which addressed whether restitution was a legal or equitable remedy, to foreclose this result. In resolving this question, the Court concluded that restitution could be both legal and equitable and, in order to draw a "fine distinction" between the two, found that the remedy was equitable where the plaintiff sought to recover particular funds or property in the defendant's possession. *Id.* at 212-14. The Fourth Circuit thus mistakenly turned a rule designed to distinguish between legal and equitable restitution into a rule of general applicability. As this Court more recently explained, "there was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity." *Sereboff*, 126 S. Ct. at 1876. Respondents' argument that relief is unavailable unless the specific funds can be traced to an account in their possession thus is unavailing.

Last, the Fourth Circuit completely ignored the statutory scheme to reach a result that cannot be squared with the overarching purpose of ERISA. Congress sought to reassure plan participants that their investments were secure, in part, by imposing personal liability on fiduciaries that breach their obligations under ERISA. The decision below undermines this important statutory objective by leaving plan participants without a remedy unless the fiduciary commits a massive breach. The Fourth Circuit's rule also will prevent plan administrators and the federal government from imposing liability on fiduciaries. Plan participants, beneficiaries, co-fiduciaries, and the federal government are all treated alike under Section 502(a)(2). Moreover, the distinction the Fourth Circuit seemingly draws between individual suits and "subclass" suits will prove judicially unmanageable. The Fourth Circuit's ruling, if adopted, therefore would serve as a major obstacle to ensuring plan solvency.

In addition, the imposition of possession and/or traceability requirements in the circumstances presented here would allow breaching plan participants and fiduciaries to continue to manipulate and withhold plan funds in dereliction of their contractual and equitable obligations. *See, e.g.*, *Sec. Mut. Life Ins. Co. of N.Y. v. Joseph*, No. CIV A 06-CV-4804, 2007 WL 1944345 (E.D. Pa. July 2, 2007). ERISA was enacted to protect participants and beneficiaries and to make certain that plans were no longer underfunded. Recovery of funds that rightfully belong to the plan is crucial to fulfilling this mandate. Accordingly, any ruling that allows those who owe contractual and equitable duties under ERISA to escape liability because they have converted or dissipated plan funds cannot be squared with the purpose and meaning of Section 502(a)(3).

ARGUMENT

I. SECTION 502 OF ERISA AFFORDS PLAN PARTICIPANTS AN EQUITABLE REMEDY FOR BREACH OF FIDUCIARY DUTY.

A. Section 502(a)(2) Authorizes Individuals to Recover Losses to Defined Contribution Plans That Result From a Breach of Fiduciary Duty.

Section 502(a)(2) of ERISA authorizes a plan "participant" to bring suit for "appropriate relief" under Section 409 of ERISA. 29 U.S.C. § 1132(a)(2). Section 409, in turn, requires a plan fiduciary to "make good" to the plan "any losses to the plan" resulting from a breach of "any of the responsibilities, obligations, or duties imposed" upon fiduciaries by ERISA. *Id.* § 1109(a); *see also id.* § 404(a)(1) (mandating that a plan "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries"); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298 (3d Cir. 1993) ("ERISA trustees must act in the interest of the employee benefit plans they serve; their duties and powers reflect Congress' policy of assuring the equitable character of the plans, and they are held accountable to the plans for their breaches." (internal citations and quotations omitted)).

Here, Petitioner has alleged that the plan fiduciary failed to invest plan assets as instructed. *See LaRue*, 450 F.3d at 572. Petitioner has further alleged that this failure constituted a breach of fiduciary duty and thus a violation of Section 502(a)(2). *Id.* ("According to the complaint, his 'interest in the plan ha[d] been depleted approximately $150,000.00' as a result of defendants' failure to follow his instructions.").

Petitioner's claim is expressly authorized under Section 502(a)(2). Petitioner is a "participant" who has brought a suit to require the plan fiduciary to "make good" on "losses to the plan" that resulted from a breach of "duties imposed" by ERISA. *See, e.g.*, *Milofsky*, 442 F.3d at 313 (finding that a "subset of participants" in an ERISA plan are "entitled" to press breach of fiduciary duty claims under § 502(a)(2)); *In re Schering-Plough Corporation ERISA Litigation*, 420 F.3d at 235 ("Section 1109 allows the Plan to recover '*any losses*' from a breach of fiduciary duty." (emphasis added)); *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003) (stating that participants in ERISA plan charging breach of fiduciary obligation could "clearly" bring suit under section 502(a)(2) because plaintiffs were seeking to have trustees reimburse the plan as relief "expressly authorized" by Section 409(a)); *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995) (holding that "a subclass of Plan participants may sue for a breach of fiduciary duty" and seek recovery to the Plan under Section 502(a)(2)). As one court explained, "ERISA entitles individual-account-plan participants not only to what *is* in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations." *Graden*, 2007 WL 2177170, at *3.

The Fourth Circuit acknowledged that Petitioner seeks a recovery that would be paid into his plan account, but nevertheless rejected the claim. *See LaRue*, 450 F.3d at 574 ("To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan."). The Fourth Circuit thus held that Section 502(a)(2) "requires" a plaintiff's "individual remedial interest [to] serve as a

legitimate proxy for the plan in its entirety," and determined that Petitioner's claim did not meet this criterion. *Id.* The Fourth Circuit's conclusion, however, is premised on the erroneous assumption that Section 502(a)(2) does not provide a remedy for harm caused to an individual plan account by a breach of fiduciary duty unless a critical mass of individual plan participants have suffered the same fate. *See id.*

To reach this result, the Fourth Circuit misread this Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). *Russell* involved a plan participant who attempted to file suit under ERISA for compensatory and punitive damages relating to an alleged wrongful denial of benefits. *Id.* at 136-37. The Ninth Circuit held that Sections 409(a) and 502(a)(2) of ERISA authorized compensatory and punitive damages. *Id.* at 137-38. The *Russell* Court granted certiorari and reversed that decision. *Id.* at 138. As the Court explained, "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Id.* at 142-43. The Court found, however, that Section 502 "says nothing about the recovery of extracontractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim." *Id.* at 144.

At bottom, *Russell* considered whether a fiduciary could be held "personally liable to a plan participant" in tort. *Id.* at 136. The Court held that the plaintiff could not recover damages for pain and suffering because the recovery was not for the plan, but was to be directly payable to the plaintiff. *See id.* at 144 ("Congress did not intend [Section 409] to authorize any relief except for the plan itself"). The Court reasoned that Section 409 emphasized the relationship between the fiduciary and the plan, requiring recovery to go to the plan. *Id.* at 140. Thus, the "reference in [Section] 409 to 'such other equitable or remedial relief as the court may deem appropriate'" had to be read in light of the requirement that "recovery for a violation of [Section] 409 inures to the benefit of the plan as a whole." *Id.*

The narrow holding in *Russell* therefore is limited to circumstances in which a plaintiff seeks personal recovery, payable directly to herself rather than to the plan in the first instance. *See, e.g.*, *Lively v. Dynegy, Inc.*, 420 F. Supp. 2d 949, 953 (S.D. Ill. 2006) ("[T]he Supreme Court, in *Russell*, simply limited the relief available under section 409 to relief that is directed to the plan rather than to individual participants."); *Kling v. Fid. Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 126 (D. Mass. 2003), *review granted in part, decision modified on other grounds*, 291 F. Supp. 2d 1 (D. Mass. 2003) (finding that even though "the harm alleged [does] not affect every single participant does not alter th[e] conclusion" that the plaintiff's suit "on behalf of the Plan . . . meets the requirements of [Section] 409 as interpreted by the Supreme Court in *Russell*"); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1414 (9th Cir. 1988) (noting that *Russell* held "that § 409(a) may not be used to award extracontractual compensatory or punitive damages to an ERISA plan beneficiary when a fiduciary mishandles the beneficiary's claim to benefits").

The case at bar is markedly different. Here, Petitioner is requesting recovery for losses to the plan. Indeed, the recovery will be paid to the plan, not to Petitioner. *See* Petition for a Writ of Certiorari at 6, 14, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (filed Nov. 6, 2006) ("Pet. for a Writ of Cert."). That the plan is comprised of individual accounts and that individuals have rights of withdrawal is of no moment. A defined contribution plan is a unitary trust. *See Graden*, 2007 WL 2177170, at *2 (explaining that Section 502(a)(2) "merely codifies for ERISA participants and beneficiaries a classic trust-law process for recovering trust losses through a suit on behalf of the trust"); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d at 234-35 (endorsing plaintiffs' argument that "the Savings Plan was a unitary trust" and noting "that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"); *Lively*, 420 F. Supp. 2d at 953 (explaining that "all assets of an individual account pension plan are owned by the Plan, not the participants" and therefore

"Plaintiffs' contention that the Plan consists of a unitary corpus of trust assets in which only its trustee enjoys an ownership interest is persuasive and consistent with fundamental trust law"); RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining the concept of a trust and distinguishing between the person who "holds title" to trust property and the beneficiary of the trust). In short, "[w]hen a common-law trustee commits a breach of trust that results in a loss, any beneficiary whose beneficial interests were affected may sue to compel the trustee to make on the loss." *Graden*, 2007 WL 2177170, at *2 (citing RESTATEMENT (SECOND) OF TRUSTS § 214 & cmt. B. (1959)). "When the trustee does so, he restores money to the trust for the benefit of the plaintiff/beneficiary." *Id.* (citations omitted)).

If Petitioner prevails, his recovery will not only restore funds to Petitioner's individual account, but will defray overhead and other administrative costs associated with the plan. *See* Brief for the United States as Amicus Curiae at 6, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (filed May 18, 2007) ("U.S. Cert. Br."). To the extent that the plan allocates expenses on a pro rata basis, all plan participants benefit from an increase in an individual's account, because that individual will pay a higher proportion of the plan's administrative expenses.[2] *See* Employee

[2] That Petitioner is no longer a member of the plan does not change the result. Petitioner's recovery will still benefit the plan. *See, e.g., Harzewski v. Guidant Corp.*, 489 F.3d 799, 807 (7th Cir. 2007) (holding that a breach of fiduciary duty under ERISA "that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty"). As the Third Circuit recently explained, "once a participant takes a lump sum distribution of the *correct* amount, he has all of his vested benefits and may no longer sue for any alleged fiduciary breaches." *Graden v. Conexant Sys., Inc.*, 2007 WL 2177170, at *4 n.10 (3d Cir. July 31, 2007). "If, however, the lump sum were improperly calculated *or otherwise deficient*, then the participant would retain a claim for benefits and thus have standing to sue." *Id.* (citing *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 349-50 (5th Cir. 1989)). Here, (Cont'd)

Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003), *available at* http://www.dol.gov/ebsa/regs/fab_2003-3.html (discussing when it is appropriate to allocate plan administrative expenses on a per capita basis versus a pro rata basis); *see also Graden*, 2007 WL 2177170, at *2 ("[T]he plan takes legal title to any recovery, which then inures to the benefit of its participants and beneficiaries."); *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d at 235 n.4 ("[T]he recovery in this case would go to the Plan as a whole to be held in accordance with the terms of the plan, including the payment of operating expenses and the like, which would redound to the benefit of all participants."). Thus, even if Section 502(a)(2) is read to require that the relief sought benefit the plan as a whole, the recovery sought here certainly satisfies this command.

The Fourth Circuit also attempted to draw a distinction between the instant case and cases in which "an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants," *LaRue*, 450 F.3d at 574 (citations omitted), apparently reasoning that Section 502(a)(2) recognizes a cause of action for the latter because such claims serve as a "proxy" for the entire plan. *Id.* ("We are . . . skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as [Section 502(a)(2)] requires.").[3] To read Section 502(a)(2) to require that the

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Petitioner did not receive the "correct" amount from the plan and therefore remains entitled to relief under ERISA.

[3] In denying the Secretary of Labor's request for en banc review, the Fourth Circuit relied on dicta from a footnote in *Russell* to support its holding that a Section 502(a)(2) "claim must 'be brought in a representative capacity on behalf of the plan as a whole.'" *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359, 362 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (2007) (quoting *Russell*, 473 U.S. at 141 n.9). Here too, however, the court misread *Russell*. The *Russell* Court made this statement to draw a distinction between relief that inures solely to an individual—such as extracontractual compensatory damages—and relief that restores funds to the plan, whether the funds are commingled in a general fund or held in an individual account.

fiduciary breach harm every member of the plan—or a "subset" or "subclass" of plan participants—not only contradicts the text of the statute, as explained above, but draws a line that is both illogical and irreconcilable with the basic purposes of ERISA.

Specifically, the Fourth Circuit's decision does not explain how ERISA can be read to create a regime that insulates plan fiduciaries from liability so long as their unlawful conduct does not harm every member of the plan. ERISA plainly states that a "participant" may bring a civil action against a fiduciary for "any" breach, and that the fiduciary is personally liable to the plan for "any" losses to the plan. 29 U.S.C. §§ 1132(a), 1109(a). The Fourth Circuit, absent a massive breach by a plan fiduciary, has rendered this important remedy an empty promise for plan participants; a result that is fundamentally at odds with a core purpose of ERISA. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) ("In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."); *see also Russell*, 473 U.S. at 140 n.8 (explaining that "[t]he floor debate . . . reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future"); *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 454 (1st Cir. 1995) ("ERISA's substantive protections are intended to safeguard the financial integrity of employee benefit funds, to permit employee monitoring of earmarked assets, and to ensure that employers' promises are kept.").

And, limiting the Fourth Circuit's decision to a requirement that suit be brought by "a subset of participants," *Milofsky*, 442 F.3d at 313, or "only a subclass of the employee benefit plan's beneficiaries," *Kuper*, 66 F.3d at 1450, cannot square the circle.[4]

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[4] Insofar as parties and courts have an interest in economy and efficiency of proceedings, courts can require that all affected plaintiffs be joined in one proceeding, or that plaintiffs obtain class certification to represent others similarly situated. *See, e.g., Coan v. Kaufman*, 457

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The Fourth Circuit failed to explain why there is a meaningful distinction between a breach of fiduciary duty that affects some subset of employees and a breach that affects only one plan participant. Even more importantly, Respondents cannot offer a coherent explanation of how courts are to discern when the breaching fiduciary has injured a "significant" enough number of plan participants to form a critical mass, Brief in Opposition at 8, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (filed Jan. 22, 2007) ("Br. in Opp'n"), or how such an arbitrary rule comports with Congress's well-documented aims in enacting ERISA. *See, e.g., O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262, 266 (1st Cir. 2001) (explaining that the Supreme Court has "made clear that a given plan must be evaluated in light of Congress' purposes in enacting ERISA" and that "[p]aramount among those aims was to safeguard employee interests by reducing the threat of abuse or mismanagement of funds" (citations omitted)).

Simply put, the Fourth Circuit misread *Russell* and, in so doing, misconstrued Section 502(a)(2). By focusing on the (mistaken) conclusion that the breach of fiduciary duty injured Petitioner alone, rather than examining the nature of the remedy sought for the breach, the Fourth Circuit extinguished the ability of plan participants to recover under Section 502(a)(2) in a vast array of cases. The right to bring suit under Section 502(a)(2) does not depend on the number of plan participants wronged by the plan fiduciary. *See, e.g., Lively*, 420 F. Supp. 2d at 953 ("By its clear terms, section 409 requires fiduciaries to make good 'any losses' to the plan, not just losses that have an impact on every single participant of the plan."); *Kling*, 270 F. Supp. 2d at 126 (explaining that just because the harm "alleged did not affect every single participant does not alter" the availability of suit under Section 409).

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F.3d 250, 262 (2d Cir. 2006) (section 502(a)(2) claim dismissed because plaintiff failed to do anything to allow the court to "safeguard the interests of others or the court's proceedings"). Here, however, Petitioner has no other similarly situated plaintiffs to join.

Moreover, a plan participant's right to recovery under ERISA should not turn on ad hoc distinctions between "subsets" and "subclasses" of employees. The rule adopted by the Fourth Circuit creates a perverse system in which a fiduciary is relieved of personal liability for his breaches to the extent that he confines his misdeeds to actions that affect only a few plan participants, and regardless of whether the resulting injury is devastating. Properly construed, Section 502(a)(2) authorizes plan participants, such as Petitioner, to hold fiduciaries liable for breaches of their obligations, so long as recovery inures to the plan and not to the plaintiff. A judicial narrowing of the statute to shield fiduciaries who breach with respect to some (but not all) plan participants is unjustified and cannot be reconciled with the text and purpose of ERISA. The Fourth Circuit's decision rejecting Petitioner's Section 502(a)(2) claim as a matter of law should be reversed.

B. Surcharge of the Plan Fiduciary Is "Equitable Relief" Under Section 502(a)(3).

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a "participant, beneficiary or fiduciary . . . to obtain appropriate equitable relief" to "enforce any provision of . . . the terms of the plan." As this Court has explained, "appropriate equitable relief" includes "those categories of relief that were typically available in equity." *Mertens*, 508 U.S. at 256. In other words, "equitable relief" under Section 502(a)(3) "is to be construed by reference to the types of relief typically available in equity, and courts are to analyze the underlying nature of the claim and relief requested by a plaintiff in order to determine whether that relief has been typically available in equity." *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 211 (3d Cir. 2004) (internal quotations omitted); *Rego v. Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003) ("Under *Mertens*, then, the relevant question is not whether a given type of case would have been brought in a court of equity, but whether a given type of relief was available in equity courts as a general rule."). In most cases, "consulting . . . standard current works such as

Dobbs, Palmer, Corbin, and the Restatements" will "make the answer clear." *Knudson*, 534 U.S. at 217.

There can be no question that "surcharge"—the traditional equitable remedy analogous to the "make whole" relief sought by Petitioner here—is typically available in equity. *See* BLACK'S LAW DICTIONARY 1482 (8th ed. 2004) (defining a "surcharge" as the "amount that a court may charge a fiduciary that has breached its duty"); RESTATEMENT (THIRD) OF TRUSTS § 205 (1992) (explaining that "[a] trustee who commits a breach of trust is . . . chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered"). Thus, "[i]f the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach." *Id.* § 205, cmt. a.

Recognition of a surcharge remedy does not constitute the imposition of "money damages," *LaRue*, 450 F.3d at 575 (quoting *Mertens*, 508 U.S. at 256), on a plan fiduciary.[5] Rather, a surcharge is, by its nature, a uniquely equitable remedy: "A surcharge is the equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." *In re Scheidmantel*, 868 A.2d at 492-93; *see also In re Carter Paper Co., Inc. v. Schott*, 220 B.R. 276, 305 (Bankr. M.D. La. 1998) (explaining that surcharge is not a "legal judgment" but rather "is, by definition, an equitable remedy imposed against fiduciaries who willfully or negligently violate

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[5] The nature of the surcharge remedy is clearly distinguishable from the compensatory damages remedy that is available at law. *See* E. Daniel Robinson, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L. Rev. 1447, 1469 (2006) ("Surcharge provides only compensation for financial loss, requires proof of a precise amount of loss, and generally requires bad faith. In contrast, tort damages have a much larger scope—they often compensate for nonpecuniary losses." (citations and footnotes omitted)).

their duties" (citations omitted)); *Barker v. First Nat'l Bank*, 20 F. Supp. 185, 190 (N.D. Ala. 1937) (finding that "it would not be *equitable to impose a penalty by way of surcharge* where the bank sustains the very definite burden, which it must sustain, of showing that the trustee acted in good faith"). Because surcharge was exclusively available in equity at the time of the divided bench, *a fortiori* this remedy is "typically available in equity" as required under *Mertens*. *See LaRue*, 450 F.3d at 575 ("Determining the applicability of [Section 502(a)(3)] therefore requires a court to examine whether the form of relief a plaintiff seeks is, like an injunction, historically one that a court of equity rather than a court of law would have granted.").[6]

Indeed, Congress specifically identified surcharge as equitable remedy in the Bankruptcy Code. 11 U.S.C. § 543(c)(3) ("The court . . . shall . . . surcharge such custodian . . . for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved . . . by a court of competent jurisdiction before the commencement of the case under this title."). As one court has explained, "Section 543's approach . . . is consistent with the Bankruptcy Code's fundamental premise: that the bankruptcy court overseeing the entire bankruptcy proceeding is in the best position to evaluate all of the equitable factors required for fair adjustment of claims and interests." *In re Si Yeon Park, Ltd.*, 198 B.R. 956, 964 (Bankr. C.D. Cal. 1996). Bankruptcy courts have employed the surcharge remedy in other contexts as well. *See, e.g.*, *Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004) ("We hold that the bankruptcy court may *equitably surcharge* a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater

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[6] *See also Dunnigan v. Met. Life Ins. Co.*, 277 F.3d 223, 229 (2d Cir. 2002) ("[T]he mere fact that money is sought does not necessarily classify the relief as damages, rather than equitable relief."); *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 498 (7th Cir. 1999) ("But not all monetary relief is damages. Equity sometimes awards monetary relief, or the equivalent, and restitution is both a legal and an equitable remedy that is monetary yet is distinct from damages.").

than what is permitted by the exemption scheme of the Bankruptcy Code." (emphasis added)). It would violate settled rules of statutory construction to interpret the equitable provisions of ERISA and the Bankruptcy Code inconsistently. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Accordingly, for all the reasons identified above, surcharge easily qualifies as "appropriate equitable relief" under Section 502(a)(3). The Fourth Circuit disagreed, however, because it read *Knudson*, and the Court's more recent decision in *Sereboff*, 126 S. Ct. 1869, to preclude this result. *See LaRue*, 450 F.3d 575-77. According to the court, under *Knudson* and *Sereboff*, the "absence of unjust possession is fatal" to a Section 502(c)(3) claim. *LaRue*, 450 F.3d at 575; *id.* at 576 (concluding that the "Court in *Sereboff* reaffirmed the possession requirement it had announced in *Knudson*"). The Fourth Circuit mischaracterized the import of these cases and construed them far more broadly than this Court intended by ignoring the context in which they were decided.

In *Knudson*, the Court addressed whether the remedy of restitution was legal or equitable. Recognizing that restitution historically had been a remedy available at both law and equity, the Court drew an admittedly "fine distinction" and found that not all restitution claims were cognizable in equity. *Id.* at 212-14. As the Court explained, where "the plaintiff could *not* assert title or right to possession of particular property . . . the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit." *Id.* at 213 (internal quotations omitted). In contrast, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* (citations omitted). Thus, in distinguishing legal restitution from equitable restitution, the Court focused on whether the plaintiff is able to identify specific funds or property in the defendant's possession. *Id.* Because the funds in *Knudson* were placed by law in a state trust, beyond the reach of

the participant, Great-West could only present a legal restitution claim akin to that of a general creditor. *Id.*

In *Sereboff*, the Court was called upon to apply *Knudson* to another ERISA equitable restitution claim. After restating the governing legal rules for examining equitable restitution claims, the Court found that the "impediment to characterizing the relief in *Knudson* as equitable is not present here." 126 S. Ct. at 1874 ("This Court in *Knudson* did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Mid Atlantic does.").[7] Moreover, the Court rejected the wooden "application of all the restitutionary conditions—including restitutionary tracing rules—to every action for an equitable lien under [Section] 502(a)(3)." *Id.* at 1876. That is, while recovery through equitable restitution requires the existence of an identifiable fund, it does not require the plaintiff to trace those funds or its product to a particular account. *Id.* Rather, the Court in *Sereboff* merely drew a distinction between the facts of *Knudson*, where "equitable restitution was unavailable because the funds sought were not

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[7] In so doing, the Court condemned the use of manipulative tactics—such as dissipation, commingling, and wrongful transfer of funds—that have plagued recovery of monies owed to plans by beneficiaries. *See Schultz v. Progressive Health, Life, & Disability Benefits Plan*, 481 F. Supp. 2d 594, 595 (S.D. Miss. 2007) (explaining that "courts of appeal have interpreted *Sereboff* to allow a plan fiduciary to pursue a claim to recover overpayments, even where the funds have been dissipated by the beneficiary" (citing *Dillard's, Inc. v. Liberty Life Assuarance Co.*, 456 F.3d 894 (8th Cir. 2006)); *Popowski v. Parrott*, 461 F.3d 1367 (11th Cir. 2006)); *Smith v. Accenture U.S. Group Long-Term Disability Ins. Plan*, No. 05-C-5942, 2006 WL 2644957, at *2 (N.D. Ill. Sept. 13, 2006) ("[T]his court reads *Sereboff* as standing for the proposition that tracing of funds is unnecessary when a plan contract contains language creating an equitable lien by agreement."). For substantially the same reasons, the Court should reject Respondents invitation to adopt a rule that would permit fiduciaries or trustees to avoid the imposition of an appropriate equitable remedy simply because the plan funds are not traceable or have been wrongfully dissipated in violation of the plan.

in Knudson's possession," and the case before it, which did not suffer from this flaw. *Id.* (citing *Knudson*, 534 U.S. at 214)).

The Fourth Circuit, neglecting the limited context of these decisions, overread *Knudson* and *Sereboff* to broadly impose the "identifiable fund" requirement on all Section 502(a)(3) claims. The Court has cautioned against this approach: "*Knudson* simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution under a provision like that at issue in this case. There was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity[.]" *Id.* Indeed, in *Knudson* itself the Court identified at least one equitable remedy—"accounting for profits"—that is cognizable under Section 502(a)(3), but that would not meet the Fourth Circuit's bright-line identifiable fund requirement. *See Knudson*, 534 U.S. at 214 n.2 ("If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, *even if he cannot identify a particular res containing the profits sought to be recovered.*" (emphasis added)); *see also Sereboff*, 126 S. Ct. at 1876.

Here, by contrast, there is no need to determine whether the surcharge remedy is equitable or legal under a particular set of facts or draw "fine distinctions" between legal surcharge or equitable surcharge. As explained above, *see supra* Section I.A., there is no doctrine of "legal surcharge"; surcharge is *only* available in equity. Accordingly, the nature of the remedy sought, in and of itself, resolves the inquiry as required by *Mertens*, and a surcharge against the plan fiduciary plainly constitutes "appropriate equitable relief" under Section 502(a)(3). The Fourth Circuit's contrary decision should be reversed.

II. THE RULE ADOPTED BY THE FOURTH CIRCUIT WILL LEAVE PLAN PARTICIPANTS WITHOUT ANY EQUITABLE REMEDY AND WILL FUNDAMENTALLY UNDERMINE ERISA.

Interpretation of Section 502 cannot be divorced from the principal aims of ERISA. *See Russell*, 473 U.S. at 158 (Brennan, J., concurring) ("[C]ourts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA—enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries."); *see also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); *Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001) (explaining that tools of statutory construction "are designed to help judges determine the Legislature's intent as embodied in particular statutory language"); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part) ("Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes.").

Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b); H.R. Rep. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights"); 120 Cong. Rec. 29929 (1974) (remarks of Sen. Williams) (explaining that ERISA imposes "strict fiduciary obligations upon those who exercise management or control over the assets or administration of an employee pension or welfare plan"); *Bixler*, 12 F.3d at 1299 ("Allowing an injured

beneficiary recourse through the courts is . . . essential to fulfilling the purpose of ERISA."); Daniel Robinson, *Embracing Equity: A New Remedy for Wrongful Health Insurance Denials*, 90 Minn. L. Rev. 1447, 1450 (2006) ("With ERISA, Congress . . . intend[ed] to protect workers from the risk of default or misadministration of their retirement plans.").[8]

ERISA fulfills this mandate by ensuring, through Section 502 civil actions, that those who participate in employer-funded retirement and benefit plans have legal recourse for improper administration of the plans. *See* 29 U.S.C. §§ 1109, 1132(a); *Healey v. Healey*, 910 F. Supp. 249, 251 (E.D.N.C. 1996) ("The purpose of ERISA generally, and the civil enforcement actions more specifically, is to establish standards for the administration of retirement plans and to give participants in retirement plans access to the federal courts to ensure appropriate remedies and sanctions."). The Fourth Circuit's decision undermines the core purposes of ERISA in at least three ways.

First, the decision leaves plan participants without any remedy for fiduciary misconduct in many, if not most, cases. *See* Pet. for a Writ of Cert. 11-12; U.S. Cert. Br. at 11. The civil remedies set forth in Section 502 of ERISA are the chief means of vindicating ERISA's overall purpose. Indeed, with respect to fiduciary liability, Section 502 is the only means of redressing a fiduciary's wrongful action. *See* 29 U.S.C. § 1132(a) (setting forth persons authorized to bring a civil action under ERISA). Congress, in enacting ERISA, broadly preempted remedies under state law, and only provided plan participants federal remedies for fiduciary misconduct under Section 502. *See* 29 U.S.C. § 1144(a); *see also Pilot Life Ins. Co. v. Dedeaux*,

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[8] *See also* Jeffrey A. Brauch, *Federal Common Law of ERISA*, 21 Harv. J.L. & Pub. Pol'y 541, 546 (1998) (noting that enactment of ERISA was in response to employers' defaulting on pension obligations); Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty under ERISA*, 41 Wayne L. Rev. 1233, 1237 (1995) ("[ERISA] was prompted in large part by the widely-held opinion that many workers who had been promised pensions were not receiving them.").

481 U.S. 41, 54 (1987) (holding that Section 502(a) creates a comprehensive and exclusive civil enforcement scheme); *Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1329 (11th Cir. 1998) ("[T]he Supreme Court has held that Congress created super preemption in ERISA, which provides the exclusive cause of action for the recovery of benefits governed by an ERISA plan.").

If the view of the Fourth Circuit prevails, however, plan fiduciaries will be free from all liability so long as the breach of duty is confined to a single plan participant, a small group of participants, or perhaps any number of participants short of 100 percent. *LaRue*, 450 F.3d at 572 ("Section 1132(a)(2) provides remedies only for entire plans, not for individuals."). Absent relief under Section 502, employees and former employees have little reason to trust that their investments are protected against unlawful actions. *See Pilot Life*, 481 U.S. at 54 (holding that civil enforcement scheme of Section 502(a) is exclusive). The Fourth Circuit's decision thus undermines ERISA by creating an exception that threatens to swallow the rule and fundamentally weakens employees' trust in the employer-based retirement plans contrary to the stated objectives of Congress in enacting this statute. *Graden*, 2007 WL 2177170, at *8 (explaining that "[s]uch a holding would allow an employer who mismanaged individual account plan assets to avoid liability by cashing out the participants" and therefore "find[ing] it hard to believe that Congress intended such a result.").

Moreover, the Fourth Circuit's interpretation does not prevent only plan participants from recovering under Section 502. Under Section 502(a)(2), "[a]ny fiduciary may bring a civil action against another fiduciary for breach of fiduciary duty." *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 626 (9th Cir. 1987) (citations omitted); *see also Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2316 (2007) (explaining that "an employer's fiduciary duties under ERISA are implicated . . . when it acts" as the plan administrator). Indeed, ERISA specifically provides for co-fiduciary liability under certain circumstances. *See* 29 U.S.C. § 1105(a) (providing that "[i]n addition to any liability which he

may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan"); *see, e.g.*, *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 103 (2d Cir. 1998) ("Silverman claims that Principal's failure to investigate and take steps to recover the $130,000 in missing plan assets constituted a breach of its co-fiduciary duties under 29 U.S.C. § 1105(a)."). Extended to its logical conclusion, however, the decision below would prevent plan administrators, including employers, from bringing suit against other plan fiduciaries to recover plan assets. Subjecting employers, particularly those that operate self-funded plans, to the artificial limitations the Fourth Circuit grafted onto Section 502(a)(2) thus will cause substantial damage to ERISA plans by preventing recovery absent a massive breach.

This same untenable limitation also would bar the federal government from imposing liability on plan fiduciaries. Section 502(a)(2) treats "the Secretary [of Labor]" and "participant[s], beneficiar[ies], [and] fiduciar[ies]" alike in their ability to bring suit under Section 409. 29 U.S.C. § 1132(a)(2). The same limitations on individual suits that the Fourth Circuit reads into the statue would thus apply to suits by the federal government seeking to redress fiduciary misconduct. *See* Secretary of Labor's Amicus Curiae Brief in Support of Petition for Rehearing and Rehearing En Banc at 7-8, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359 (4th Cir. 2006) (No. 05-1756) (noting role of Secretary of Labor in bringing numerous cases against "fiduciaries who failed to forward some, but not all, employee contributions to their plan"). Accordingly, because the decision below guts any deterrent to misconduct by plan fiduciaries in many if not in most cases, it cannot be squared with the core purposes underlying ERISA.[9]

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[9] The Fourth Circuit consoled Petitioner by noting that Congress had made available other remedies: Petitioner could "seek an injunction compelling compliance with his investment instructions" or "bring suit on the plan's behalf to remove the fiduciary." *LaRue*, 450 F.3d at 578. There remedies ring hollow, however, because a plan fiduciary is hardly likely to announce in advance that he intends to disregard a plan

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Second, the decision is irreconcilable with the basic tenet of ERISA that a fiduciary owes a duty to each plan participant. *See* 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."); *see also Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) (rejecting argument that fiduciary duty under ERISA did not extend "beyond plan asset management to individual beneficiaries"); *Gaither*, 388 F.3d at 775 n.6 ("Both Justice Brennan's [*Russell*] concurrence and the Court's opinion in *Howe* make it clear that although a fiduciary must be impartial among the various beneficiaries, it still owes fiduciary duties to each individual beneficiary."); *Spencer v. Central States, Southeast and Southwest Areas Pension Fund*, 778 F. Supp. 985, 995 (N.D. Ill. 1991) (explaining that ERISA fiduciary owed a fiduciary duty to individual beneficiaries as well as the plan itself).

Under the Fourth Circuit's approach, instead of owing a fiduciary duty to each plan participant, a fiduciary owes a duty only to the plan as a whole. *See LaRue*, 450 F.3d at 574 (fiduciary duty owed "solely to" Petitioner unenforceable under the Fourth Circuit's interpretation of § 1132(a)(2)). A fiduciary thus could decide to affirmatively harm a plan participant (or several participants in unrelated ways), and the injured plan participant(s) would be without any recourse under ERISA. Under such a regime, a backlash against ERISA plans is inevitable. Employees will have less confidence in retirement or benefit plans in the face of a judicial declaration that Congress did not intend individual protection of employees. Indeed, plans that offer to employees investment choices may become

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participant's investment instructions or otherwise misappropriate a participant's funds. The Fourth Circuit's suggestion is somewhat akin to suggesting that a patient is fully protected from medical malpractice by law because he can always secure an injunction to prevent his surgeon from performing a second wrongful operation, or, if absolutely necessary, get court permission to change doctors. Putative remedies of this nature afford no real relief to plan participants and provide no real deterrent to fiduciary misconduct.

disfavored when employees learn that their investment instructions are unenforceable. *See* U.S. Cert. Br. at 12.

Furthermore, to the extent that other courts follow the Fourth Circuit's mistaken interpretation of *Knudson* and *Sereboff* and insist on possession and/or traceability as prerequisites to equitable recovery, plan fiduciaries and participants will continue to cynically manipulate ERISA-related funds. Plan fiduciaries will fail to exercise proper care in handling participants' funds safe in the knowledge that the courts have confronted participants with a high bar to recovery. For their part, plan participants, encouraged by trial lawyers, will continue to convert and commingle funds in obvious attempts to avoid the equitable restitution that is required under ERISA. Fiduciaries and participants alike have an equitable obligation to adhere to the terms of the plan and not dissipate plan assets. *See Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997) ("A primary purpose of ERISA is to ensure the integrity and primacy of the written plans"). Given these basic purposes of ERISA, Section 502(a)(3) cannot be read to limit recovery to those cases in which the plan funds can be traced to a specific account held by the wrongdoer. *See* 29 U.S.C. § 1001(b) (explaining that ERISA "provide[s] for appropriate remedies, sanctions, and ready access to the Federal courts"); *McGann v. H & H Music Co.*, 742 F. Supp. 392, 393 (S.D. Tex. 1990) (explaining that ERISA was enacted to "protect the solvency of employee benefit plans to ensure that the valid claims of employees and their beneficiaries will be paid" (citation omitted)).

Thus, if the Fourth Circuit's ruling is adopted, ERISA plans and plan participants will continue to suffer higher costs from the gamesmanship of a selfish few. *See, e.g.*, *Reichert v. Liberty Life Assurance Co.*, No. 05-2518, 2007 WL 433321, at *12 (D.N.J. Feb. 5, 2007) (despite concededly valid equitable claim under ERISA, plan participant did not have to return overpayments that had been squandered); *Sec. Mut. Life Ins. Co.*, 2007 WL 1944345, at *3 (court ordered discovery as to overpayments, but noted that recovery would be precluded if defendant "dissipated" overpayments). Congress could not have intended that inefficient

or dishonest transactions would allow parties to evade their equitable responsibilities under ERISA. The Fourth Circuit's opinion unjustifiably truncates the statutorily required fiduciary duty owed to plan participants, undermines public confidence in ERISA, and encourages wasteful, inefficient, and sometimes unlawful behavior. *Hollingshead v. Burford Equip. Co.*, 747 F. Supp. 1421, 1426 (M.D. Ala. 1990) ("ERISA is a remedial statute designed to protect the interests of employees by guarding against abuse in the administration of such benefit plans, and to protect employers from conflicting and inconsistent state regulation of such plans.").

Third, the Fourth Circuit's ruling will inevitably prove to be judicially unmanageable in practice, because the decision gives no guidance as to how many plan participants a fiduciary must injure before the wronged parties can file suit under Section 502(a)(2). In its decision denying rehearing en banc, the Fourth Circuit first stated that Section "502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359, 362 (4th Cir. 2006). The court went on to suggest, however, that it accepted the logic of circuit courts that have held otherwise, stating "liability under [Section] 502(a)(2) is not limited to losses that accrue to *all* plan participants." *Id.* at 363. The Court attempted to explain the distinction by stating that liability is limited to "plan losses," *id.*, but left unexplained how the diminution of one participant's interest in the plan is not a plan loss while the diminution of some greater number of participants' interests is a plan loss despite the fact that not all plan participants are affected.

As the Solicitor General and Petitioner both note, "approximately 91% of all private retirement plans have fewer than 100 participants." U.S. Cert. Br. at 11. In such plans, a handful of individuals will make up a significant percentage of plan participants. Courts facing a fiduciary breach that affects only some of the participants will have to analyze claims that are individualized yet affect a relatively high percentage of plan participants. Unpredictability and instability are toxic to a regime

such as ERISA. *See Cann v. Carpenters' Pension Trust Fund for N. Cal.*, 989 F.2d 313, 317 (9th Cir. 1993) ("[T]he congressional purpose [of ERISA] emphasized promotion of 'the soundness and stability of plans with respect to adequate funds to pay promised benefits.'" (quoting 29 U.S.C. § 1001(a)); *Hollingshead*, 747 F. Supp. at 1426 ("Congress enacted ERISA in 1974 in an attempt to establish stability and prevent loss, thereby providing comprehensive federal regulation of all plans which provide fringe benefits to employees."); *McKinnon v. Cairns*, 698 F. Supp. 852, 859 (W.D. Okl. 1988) ("When enacting ERISA, Congress intended to establish a comprehensive remedial scheme to resolve problems in private employee benefit plans and to provide security, stability and uniformity in this area." (citing 29 U.S.C. §§ 1001(a)-(b)).

Moreover, Respondents' suggestion that a subclass must contain "a significant number of participants" before Section 502(a)(2) relief is available does not provide a path out of the quandary. Br. in Opp'n at 8.[10] A court trying to decide what

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[10] Though Respondents might answer that a subclass is "significant" if it contains enough members to necessitate proceeding as a class action, this argument overlooks the facts that (1) nothing in ERISA incorporates the standards of Federal Rule of Civil Procedure 23 by reference; and (2) Rule 23 does not breathe life into otherwise invalid claims, but merely provides a means to consolidate common *valid* claims into a single suit. *See, e.g., Lyon v. Atl. Coast Line R.R. Co.*, 224 F. Supp. 1014, 1017 (D.S.C. 1964) (Rule 23 "has never been interpreted so as to deprive a person of an individual claim if such claim would have existed in the absence of the rule."); *Cox v. Hutcheson*, 204 F. Supp. 442, 447 (S.D. Ind. 1962) (noting that entire action should not "be summarily dismissed merely because it fails as a class action"). The idea that a plaintiff may not seek recourse in federal court without first proving that the defendant wronged numerous others in the exact same way seems wholly foreign to American law, and nothing in the text or legislative history of ERISA suggests that Congress intended to introduce this bizarre notion into American jurisprudence. *See Int'l Woodworkers of Am., AFL-CIO, CLC v. Georgia-Pacific Corp.*, 568 F.2d 64, 66 (8th Cir. 1977) ("[A] litigant's individual claim survives the determination that he cannot maintain his action as the

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"significant" means will be left to puzzle over the fact that the Fifth Circuit considered a fiduciary breach that affected 1 in 390 participants to be significant, *see* U.S. Cert. Br. at 10, while the Fourth Circuit rejected a breach that affected 1 in 300 participants as insignificant, *LaRue* 450 F.3d at 574. *See also* U.S. Cert. Br. at 10. Accordingly, the rule endorsed by the Fourth Circuit will prove to be unworkable in practice because there is no logical, coherent, or just way to distinguish between otherwise identical fiduciary breaches that affect a "significant" subset of plan participants and breaches that affect fewer participants. Courts attempting to craft such a rule on an ad hoc basis will doubtless employ conflicting rationales that will require further intervention by either Congress or this Court. It would be far better for this Court to adhere to the plain language of the statute and allow recovery to the plan in any case in which the plaintiff can show a fiduciary breach.

CONCLUSION

For the reasons set forth herein, the judgment of the Fourth Circuit should be reversed.

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representative of a class under Fed. R. Civ. P. 23."); 32B Am. Jur. 2d *Federal Courts* § 1679 (2007) ("Provided the district court has jurisdiction, a litigant's individual claim survives the determination that the litigant may not maintain his or her action as the representative of a class under Rule 23.").

Respectfully submitted,

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